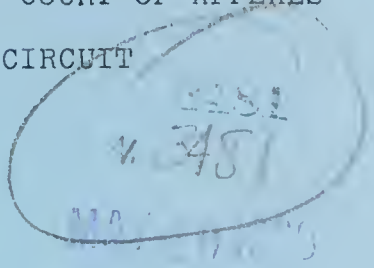
IN THE UNITED STATATES COURT OF APPEALS

FOR THE NINTH CIRCUIT



R. D. PENDLETON,

Appellant,

vs.

L. S. NELSON, Warden, et al.,

Appellee.

No. 22463

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, U.S.C. section 2241. The jurisdiction of this Court is conferred by Title 28, U.S.C. section 2253, which makes a final order in a habeas corpus proceeding reviewable by the Court of Appeals, when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts

Appellant was convicted in 1964 of possession of marijuana; possession of marijuana for sale and statutory rape.[1/] Thereafter, the conviction for statutory rape was

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1. The actual sequence of these events is somewhat confusing. On or about January 1, 1964, appellant committed the crimes of statutory rape and possession of marijuana. On or about February 1, 1964, appellant committed the crimes

reversed by the California Court of Appeal, Second District. The remaining counts were affirmed. See People v. Pendleton, Crim. No. 10215 and Crim. No. 10473. (This opinion was not certified for publication pursuant to Rule 976 of the California Rules of Court.)

Thereafter appellant petitioned for a hearing in the Supreme Court of California which was denied. Appellant's petition for a rehearing in the state Supreme Court was also denied.

B. Proceedings in the federal court

On September 8, 1967, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California. On November 22, 1967, the United States District Court denied appellant's petition for a writ of habeas corpus. On December 19, 1967, appellant filed his notice of appeal and the court granted appellant's application for a certificate of probable cause and allowed him to appeal informa pauperis.

STATEMENT OF FACTS

Appellant was tried and convicted at two separate trials, which were consolidated on appeal. The Court of Appeal, Second District reversed in part and affirmed in

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fn. 1 continued

of possession of marijuana and possession of marijuana for sale. Appellant was sentenced for the February 1st offense on May 15, 1964, and for the January 1st offense on June 29, 1964.

part.[2/]

The facts are summarized in the opinion of the California Court of Appeal.

THE FIRST OFFENSE - SECOND TRIAL (Statutory rape and possession of marijuana).

A 17-year-old girl complained to police that she and Pendleton had had sexual intercourse after he had given her narcotics at a motel. Officer Vernon went to Pendleton's apartment and arrested him for statutory rape and furnishing narcotics to minors. A female co-occupant of the apartment was permitted to use the bathroom. When she came out, the officers noted the bathroom window, which had been closed, was wide open. They searched under the window and found a package containing four marijuana cigarettes. Pendleton was confronted with the four cigarettes and asked if they were his or the woman's. He replied, "I will take the beef, they are mine." The officer said "I didn't ask you that, I asked you whose are they?" Pendleton again stated "I will take the beef, they are mine."

THE SECOND OFFENSE - FIRST TRIAL (possession of marijuana and possession of marijuana for sale).

While Pendleton was in custody on the earlier charges, he had told Officer Burke he had been selling large

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2. The unpublished opinion of the California Court of Appeal is appended by appellee as Exhibit "A". See 28 U.S.C.A., § 2254(d).

quantities of marijuana in the Watts area. Pendleton's girl friend had also told the officer she had seen Pendleton with large quantities of marijuana. Three weeks later, Officer Burke parked outside Pendleton's apartment house and observed Pendleton and co-defendant Hampton drive into the driveway. The officers did not know who owned the car but Hampton was driving. The officers identified themselves and asked Pendleton, "Do you have any narcotics on you or in the car?" Pendleton replied "No. Go ahead and look." Hampton remained silent. The officers searched the car and found about three-quarters of a pound of marijuana. Both defendants were then arrested.

SUMMARY OF APPELLANT'S CONTENTIONS

1. Appellant was denied his right to remain silent and his right to an attorney.

2. There was no probable cause to arrest appellant without a warrant.

SUMMARY OF APPELLEE'S CONTENTIONS

I. The standards established in Escobedo v. Illinois are not applicable as appellant's trial occurred before the date of that opinion.

II. There was probable cause to arrest appellant and to conduct a search incident to that arrest (1st offense - 2nd trial).

III. Appellant consented to the search (2nd offense - 1st trial).

ARGUMENT

I.

THE STANDARDS ESTABLISHED IN ESCOBEDO V. ILLINOIS ARE NOT APPLICABLE AS APPELLANT'S TRIAL OCCURRED BEFORE THE DATE OF THAT OPINION.

The District Court stated in its order denying the petition that petitioner claimed that he was denied his right to counsel and his right to remain silent. The court held that this contention was without merit stating that appellant's trial began on June 1, 1964, and therefore the guidelines set forth in Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966) are not applicable. See Johnson v. New Jersey, 384 U.S. 719 (1966). In so ruling, the district court was unquestionably correct.

II.

THERE WAS PROBABLE CAUSE TO ARREST APPELLANT (1st Offense - 2nd Trial).

Appellant was arrested pursuant to a complaint of a minor who alleged that appellant had had sexual relations with her. The search of the premises which disclosed the four marijuana cigarettes was proper as incidental to the arrest. Harris v. United States, 331 U.S. 145 (1947); Ker v. California, 374 U.S. 23 (1963).

III.

APPELLANT CONSENTED TO THE SEARCH
(2nd Offense - 1st Trial)

Appellant contends there was no probable cause for the arrest because the consent to search the car was not given voluntarily. He argues it was involuntary because he submitted to the authority of the officers "under great pressure." This contention is without merit. The question of consent is basically a question of fact to be determined by the trial court. (People v. Shelton, 60 Cal.2d 740, 746 (1964); Castaneda v. Superior Court, 59 Cal.2d 439, 442 (1963); People v. Campos, 184 Cal. App.2d 489, 494 (1960).) The trial court found the consent was voluntary, taking into account the fact that Pendleton was not under arrest (Castaneda v. Superior Court, 59 Cal.2d 439, 443 (1963)), that the officers had the right to interview suspects (People v. Michael, 45 Cal.2d 751, 754 (1955)), and that the officers did not assert any right to search the car (People v. Michael, 45 Cal.2d 751, 754 (1955)). No doubt the defendant was somewhat nervous, since he found himself talking to the police while in the act of transporting a bulk package of marijuana, but this is hardly enough to sustain a claim of actual or implied assertion of authority to search by the police. California Court of Appeal Opinion, pages 4-5.

The district court came to the same conclusion, stating in the order denying the petition:

". . . petitioner admits that he consented to each of the two separate searches. Therefore, this court need not even reach the question whether the searches were illegal, as petitioner has waived any possible objection. Cf. Stoner v. California, 376 U.S. 483 489 (1964). Moreover, while petitioner now baldly argues that his consent was not voluntarily given, he alleges no supporting facts whatever." United States District Court Opinion, page 3. Also see California Court of Appeal Opinion, pages 5, 6.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court denying the writ of habeas corpus should be affirmed.

DATED: April 19, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: April 19, 1968

Ronald H. Kearney

RONALD H. KEARNEY
Deputy Attorney General

RHK:lp

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

64-986

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. R. D. PENDLETON, Defendant and Appellant.	Crim. No. 10215 and Crim. No. 10473

APPEALS from judgments of the Superior Court of Los Angeles County. Sidney W. Kaufman (#10215) and Robert Clifton (#10473), Judges. Reversed in part; affirmed in part.

Bertram H. Ross for Appellant.*

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, S. Clark Moore, Deputy Attorney General, for Respondent.

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* By appointment of the District Court of Appeal.

Consolidated appeals from two trials. In the first trial (# 10215), Pendleton was convicted of statutory rape (Penal Code, § 261, subd. 1) and possession of marijuana (Health & Saf.Code, § 11530). The issue is whether People v. Dorado, 62 Cal.2d 338, was violated.

A 17-year-old girl complained to police that she and Pendleton had had sexual intercourse after he had given her narcotics at a motel. Officer Vernon went to Pendleton's apartment and arrested him for statutory rape and furnishing narcotics to minors. A female co-occupant of the apartment was permitted to use the bathroom. When she came out, the officers noted the bathroom window, which had been closed, was wide open. They searched under the window and found a package containing four marijuana cigarettes. Pendleton was confronted with the four cigarettes and asked if they were his or the woman's. He replied, "I will take the beef, they are mine." The officer said "I didn't ask you that, I asked you whose are they?" Pendleton again stated "I will take the beef, they are mine." Since the officer's suspicions had been aroused by the woman's conduct, we think that the questions were legitimate investigatory questions designed to discover which person owned the marijuana cigarettes. At that time the finger of suspicion pointed to the woman, not to Pendleton. Since the questioning was investigatory questioning at the scene, Dorado is inapplicable.

An hour later, Pendleton was questioned at the police

station. The record does not indicate whether Pendleton had been formally charged or booked at this time. Pendleton again stated that the four marijuana cigarettes found during the search of the apartment belonged to him, not to the woman in the room. Respondent contends that even if the accusatory stage had been reached, the confession merely duplicated the earlier confession made during the investigatory stage, the error was harmless, and automatic reversal is not required. (People v. Jacobson, 63 A.C. 335, 347; People v. Cotter, 63 A.C. 404, 416.) The Cotter test for required reversal is whether there is any reasonable probability that the illegally-obtained confession contributed to the conviction. (63 A.C. at 416.) Here, as in Cotter and Jacobson, the later illegal confession duplicated the earlier legal confession, and its introduction into evidence was cumulative. (People v. Boyden, 237 A.C.A. 821, 825; People v. Martinez, 239 A.C.A. 176, 189-190.) The error, if any, was harmless. (Calif.Const., Art. VI, § 4 1/2; Penal Code, § 1404.)

During the same conversation Pendleton said he knew the complaining witness was under eighteen and he had had intercourse with her. These statements constituted a confession of statutory rape, but the record does not clearly indicate the length and circumstances of the interrogation, the questions asked, and other information necessary to decide whether the accusatory stage had matured under the objective test of People v. Stewart, 62 Cal.2d 571, 579 [cert.granted]

"However, since this case was tried prior to [the Dorado and Stewart] decisions, the record, quite naturally, is very terse and indefinite with respect to such aspects of the case which now have become vital in the application of these new rules." (People v. North, 233 Cal.App.2d 884, 887.) The proper procedure is to reverse the statutory rape count in order that factors relevant to the application of Dorado and Stewart may be further developed. (People v. North, 233 Cal.App.2d 884, 887-888.)

In the second appeal (# 10473), search and seizure issues are presented. Pendleton was convicted of possession of marijuana for sale (Health & Saf.Code, § 11530.5) and possession of marijuana (Health & Safe.Code, § 11530). While Pendleton was in custody on the earlier charges, he had told Officer Burke he had been selling large quantities of marijuana in the Watts area. Pendleton's girl friend had also told the officer she had seen Pendleton with large quantities of marijuana. Three weeks later, Officer Burke parked outside Pendleton's apartment house and observed Pendleton and co-defendant Hampton drive into the driveway. The officers did not know who owned the car but Hampton was driving. The officers identified themselves and asked Pendleton, "Do you have any narcotics on you or in the car?" Pendleton replied "No. Go ahead and look." Hampton remained silent. The officers searched the car and found about three-quarters of a pound of marijuana. Both defendants were then arrested.

AOB

Pendleton contends there was no probable cause for the arrest because the consent to search the car was not given voluntarily. He argues it was involuntary because he submitted to the authority of the officers "under great pressure." This contention is without merit. The question of consent is basically a question of fact to be determined by the trial court. (People v. Shelton, 60 Cal.2d 740, 746; Castaneda v. Superior Court, 59 Cal.2d 439, 442; People v. Campon, 184 Cal. App.2d 489, 494.) The trial court found the consent was voluntary, taking into account the fact that Pendleton was not under arrest (Castaneda v. Superior Court, 59 Cal.2d 439, 443), that the officers had the right to interview suspects (People v. Michael, 45 Cal.2d 751, 754), and that the officers did not assert any right to search the car (People v. Michael, 45 Cal.2d 751, 754). No doubt the defendant was somewhat nervous, since he found himself talking to the police while in the act of transporting a bulk package of marijuana, but this is hardly enough to sustain a claim of actual or implied assertion of authority to search by the police.

Pendleton suggests he did not have authority to give AOB the officers permission to search a car which did not belong to him. In the usual case the person purporting to authorize the search is a third person, not the defendant, and the issue is one of the extent to which a third person without actual authority can waive the constitutional rights of a defendant by giving consent to a search. (People v. Cruz, 61 Cal.2d

861, 866-867; People v. Gorg, 45 Cal.2d 776, 783; Bielicki v. Superior Court, 57 Cal.2d 602, 607-608 [collecting cases].) In this case, however, the defendant is attacking the validity of his own consent by asserting his own lack of authority to authorize a search of the car. The distinction carries a difference, because in this case the defendant personally consented to the search, while in the usual case a defendant has not. His personal consent voluntarily given is sufficient authority to validate the search insofar as it relates to him. Even if Pendleton did not have authority to consent to an invasion of the constitutional rights of his codefendant and the search was illegal as to the codefendant, an issue which we need not decide,[1] the search was legal as to Pendleton, and the evidence discovered as a result of the search could be used against him. (People v. Campos, 184 Cal.App.2d 489, 494; People v. Silva, 140 Cal.App.2d 791, 794-795; People v. Ransome, 180 Cal.App.2d 140, 145-146.)

Following the arrests codefendant Hampton directed the officers to a garage where more marijuana was kept. Officer Burke testified he looked in the window of the garage and saw marijuana on a table five feet from the window. It is settled that no illegal entry or search is involved when

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Since the codefendant did not object to the search, this in itself was evidence that he also acquiesced. (People v. Smith, 210 Cal.App.2d 252, 256.)

contraband is plainly visible to anyone looking in a window. (People v. Martin, 45 Cal.2d 755, 762; People v. Terry, 61 Cal.2d 137, 152; Bielicki v. Superior Court, 57 Cal.2d 602, 607.)

The conviction for statutory rape is reversed. The two convictions for possession of marijuana and the conviction for possession of marijuana for sale are affirmed.

FLEMING, J.

We concur:

P. J.

J.

THE COURT: This opinion is not for publication pursuant to the provisions of Rule 976, California Rules of Court.